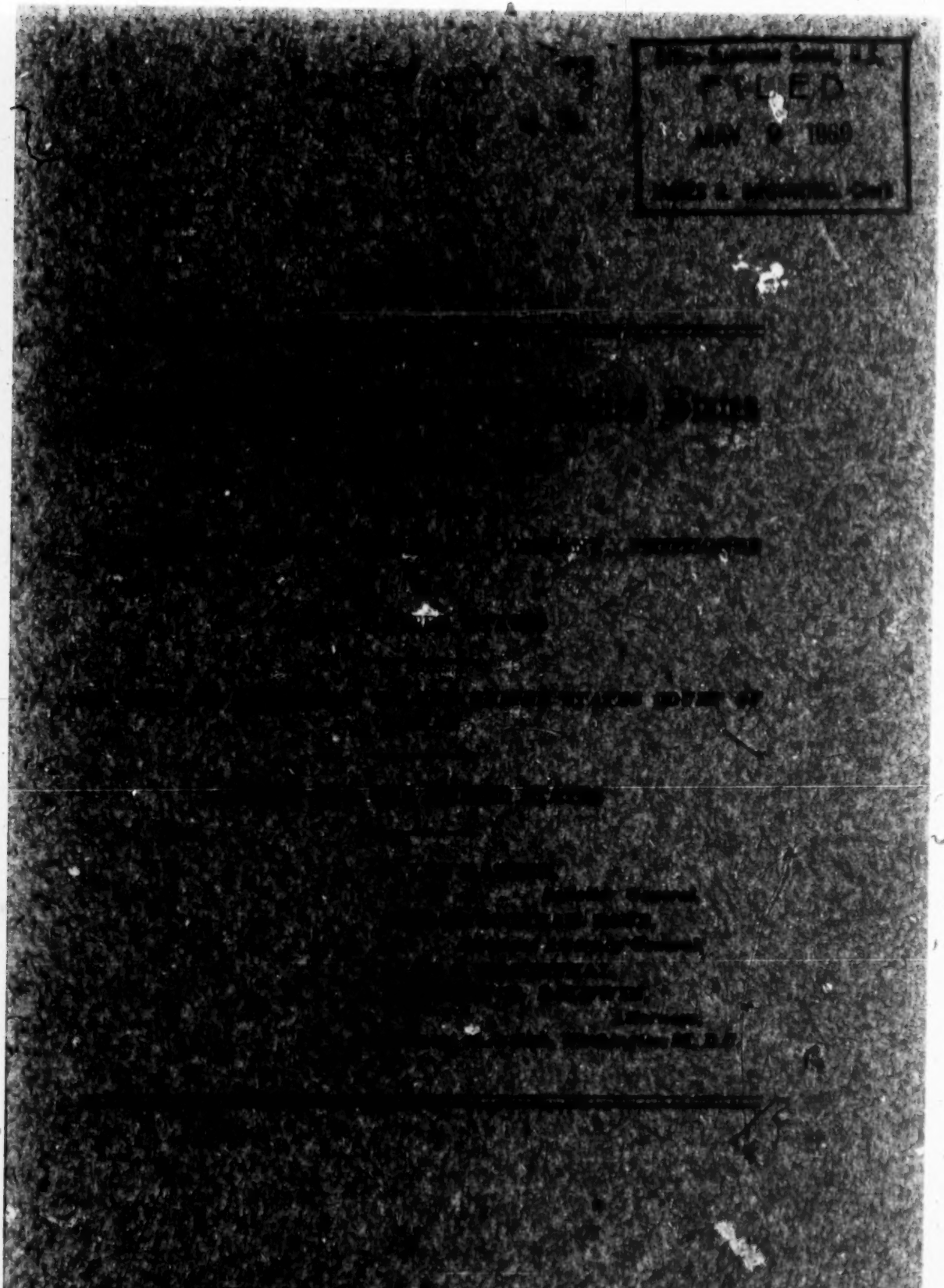
FILED
MAY 9 1969

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Summary of argument | 5 |
| Argument | 7 |
| I. Introduction: The practical advantages and disadvantages of the alternative review proceedings | 9 |
| II. When the Court of Claims refers a rate issue to the Commission, its determination is reviewable under 28 U.S.C. 1336 by a district court | 14 |
| A. Under prior decisions of this Court, Commission determinations upon reference are reviewable orders | 14 |
| B. The Court of Claims does not have authority to review a determination of the Commission, whether or not made upon reference | 18 |
| III. When a district court refers an issue to the Commission, its determination with respect to rates may be reviewable by the referring district court in those cases in which venue in another district may appropriately be held to have been waived. In other cases, review must be had in the district court with venue under 28 U.S.C. 1398 | 21 |
| IV. The Commission determination is reviewable by a single-judge, not a three-judge, district court | 23 |
| Conclusion | 24 |


## CITATIONS


Cases:

*Davidson Transfer and Storage Co.* v. *United States*, 164 F. Supp. 571 ..... 8, 23

*Eastern Freight-Ways, Inc.* v. *United States*, 170 F. Supp. 848 ..... 23

Cases—Continued Page

*El Dorado Oil Works* v. *United States*, 59 F. Supp. 738, affirmed, 328 U.S. 12 ..... 15
*El Dorado Oil Works* v. *United States*, 328 U.S. 12 ..... 5, 15, 18, 24
*Far East Conference* v. *United States*, 342 U.S. 570 ..... 12
*General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 ..... 15
*Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U.S. 452 ..... 14
*Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541 ..... 14
*Neirbo Co.* v. *Bethlehem Corp.*, 308 U.S. 165 ..... 6, 22
*Panhandle Co.* v. *Power Commission*, 324 U.S. 635 ..... 6, 22
*Peoria & P.U.R. Co.* v. *United States*, 263 U.S. 528 ..... 6, 22
*Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 ..... 5, 14, 17, 18
*Shannahan* v. *United States*, 303 U.S. 596 ..... 8, 17, 18
*Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134 ..... 11
*United States* v. *Atlanta, B. & C. R. Co.*, 282 U.S. 522 ..... 8, 17, 18
*United States* v. *Interstate Commerce Commission*, 337 U.S. 426 ..... 7, 21, 24
*United States* v. *Jones*, 336 U.S. 641 ..... 6, 19
*United States* v. *Los Angeles & Salt R. Co.*, 273 U.S. 299, reversing 4 F. 2d 736 ..... 8, 16, 18
*United States* v. *United States, et al.*, Civil Action No. 1057–58, D. D.C., decided October 5, 1959 ..... 8, 23
*United States* v. *Western Pacific R. Co.*, 352 U.S. 59 ..... 3, 7, 10, 12

Statutes:

Administrative Procedure Act, Sections 2(d), 10, 5 U.S.C. 1001(d), 1009 ..... 20
Communications Act of 1934, 48 Stat. 1064, Section 402(a) ..... 14
Railway Labor Act, as amended, 48 Stat. 1185, Section 1 ..... 17
Transportation Act of 1940, Section 322, 49 U.S.C. 66 ..... 3
28 U.S.C. (1946 ed.) 41(6) ..... 19
28 U.S.C. 1336 ..... 2, 4, 5, 6, 7, 8, 10, 13, 14, 20, 24
28 U.S.C. 1398 ..... 2, 4, 6, 7, 10, 13, 15, 20, 21, 22, 24
28 U.S.C. 2321 ..... 7, 23
28 U.S.C. 2322 ..... 13

Statutes—Continued

| | Page |
|---|---|
| 28 U.S.C. 2323 | 8, 13 |
| 28 U.S.C. 2325 | 23 |
| 49 U.S.C. 17(9) | 2, 4, 8, 11, 13, 20, 21, 24 |
| Urgent Deficiencies Appropriations Act of 1913, 38 Stat. 219 | 5, 13, 14, 16, 17, 21 |

Miscellaneous:

| | |
|---|---|
| Davis, *Administrative Law* (1951), pp. 654–655 | 17 |

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER

*v.*

THE UNITED STATES

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

No opinion was rendered by the Court of Claims. Its order entering judgment is unreported (R. 49–50).

### JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1959. On August 21, 1959, the time for the filing of a petition for a writ of certiorari was extended by Mr. Justice Stewart to October 3, 1959 (R. 50). The petition for a writ of certiorari was filed on October 2, 1959, and was granted on December 14, 1959 (R. 51). The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

## QUESTION PRESENTED

Whether a determination made by the Interstate Commerce Commission on an issue of reasonableness of transportation charges, raised in litigation in the Court of Claims and referred to the Commission under the "primary jurisdiction" doctrine, is subject to review by a district court under the provisions of 28 U.S.C. 1336 and 49 U.S.C. 17(9).

## STATUTES INVOLVED

The relevant provisions of the United States Code are as follows:

28 U.S.C. § 1336.

> Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

28 U.S.C. § 1398.

> Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

49 U.S.C. § 17(9).

> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied,

or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

## STATEMENT

During 1941 and 1942, petitioner transported certain shipments for the United States from specified inland points to the port of New York for exportation to Great Britain. Wartime conditions prevented the exportation of the shipments as intended. Thereafter, petitioner rendered bills for the transportation based upon the applicability of the rates published in the domestic tariff, rather than the lower rate specified in the export tariff. As required by Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, the bills were paid in full upon presentation. Upon post-payment audit, and as authorized by Section 322, the General Accounting Office deducted from other charges due petitioner the difference between the domestic and export rates, on the ground that, in the light of prior decisions of the Interstate Commerce Commission, the domestic rates claimed were unreasonable as applied to these shipments (R. 8–17).

Petitioner then brought suit in the Court of Claims to recover the amounts thus deducted (R. 1–3). On the authority of *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, the court referred to the Commis-

sion, under the primary jurisdiction doctrine, the question of the proper charges to be applied (R. 17–18). Pursuant to the court's order, the Government filed a petition with the Commission and, after investigation and hearing, the Commission determined that, with respect to the majority of the shipments, the domestic rates were unreasonable to the extent that they exceeded the export rates. The Commission made and filed a report containing its findings of fact and conclusions of law, and ordered that the proceedings before it be discontinued. On March 4, 1959, the Commission denied a petition for reconsideration filed by petitioner (R. 20–30).

On March 23, 1959, the United States moved the Court of Claims to vacate its order of suspension and to enter judgment for petitioner in the sum of $1,663.39, which constituted that portion of the recovery claimed by petitioner and found by the Commission to represent reasonable charges (R. 18). Petitioner opposed this motion and moved the Court of Claims to stay proceedings until the rendition of a final decision in an action which petitioner proposed to commence for the purpose of obtaining relief from the order of the Commission (R. 30–31). On April 3, 1959, petitioner filed a petition in the United States District Court for the Eastern District of Pennsylvania invoking that court's jurisdiction under 28 U.S.C. 1336 and 1398 and 49 U.S.C. 17(9) (R. 38–42). The United States opposed petitioner's motion for a stay in the Court of Claims (R. 32–37).

On June 5, 1959, the Court of Claims granted the Government's motion to vacate the suspension, and

entered judgment for petitioner in the sum of $1,663.39, "on the basis of the record made in this case, including the determination by the Interstate Commerce Commission" (R. 49–50).[1]

## SUMMARY OF ARGUMENT

1. The Interstate Commerce Commission's determination as to the reasonableness of certain transportation charges, made on referral from the Court of Claims, is not an "abstract declaration" or a mere "stage in an incomplete process of administrative adjudication." Rather, the determination carries serious and direct "legal consequences" for the litigants; for under the doctrine of primary jurisdiction and administrative finality it was binding upon the Court of Claims. Thus, under this Court's decisions in *El Dorado Oil Works* v. *United States,* 328 U.S. 12, and *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, the Commission's determination was a reviewable "order" within the meaning of 28 U.S.C. 1336. Decisions of this Court holding Commission determinations non-reviewable under the Urgent Deficiencies Appropriations Act, from which Section 1336 is derived, are either distinguishable, or no longer controlling, since this Court's decision in the *Rochester Telephone Corp.* case. Unless Commission referral determinations are reviewable under 28 U.S.C. 1336, there can be no review of determinations

[1] Neither party requested review by the Court of Claims of the Commission's determination, and the court did not purport to review it.

made on referrals from the Court of Claims and state courts.

2. The Court of Claims does not have authority to review a determination of the Commission, whether or not the issue was referred by the Court of Claims to the Commission. Congress has not empowered that Court to review decisions of the Commission and the restrictions Congress has imposed upon the review of orders of the Commission, as well as the limited jurisdiction conferred by the Congress upon the Court of Claims, preclude an inference of such authority. *United States* v. *Jones,* 336 U.S. 641. Therefore, unless referral determinations are reviewable by the district courts under 28 U.S.C. 1336, they would not be reviewable by any court even if arbitrary and contrary to law.

3. In contrast to referrals by the Court of Claims, when a district court refers an issue as to the reasonableness of rates to the Commission, it would be preferable, to the extent consistent with the statutory plan, for the referring district court to review the Commission's determination. Congress appears to have explicitly authorized review proceedings in all federal district courts with venue (28 U.S.C. 1398). If the original district court must await review action by another district court, the resulting circuitous procedure, with its multiplicity of proceedings in the district courts, would not appear to accord with desirable judicial administration. Since venue relates solely to the convenience of litigants (*Neirbo Co.* v. *Bethlehem Corp.,* 308 U.S. 165) and venue may be waived by any party, including the Government (*Panhandle Co.* v. *Power Commission,* 324 U.S. 635, 639; *Peoria & P.U.R.*

*Co.* v. *United States*, 263 U.S. 528, 535–536), the venue provision of 28 U.S.C. 1398 might be deemed, in appropriate cases, to be waived by voluntary action of the parties in the course of the proceedings. However, where a waiver cannot properly be inferred, review must be had in the venue prescribed by 28 U.S.C. 1398.

4. Commission decisions pertaining to the reasonableness of charges sought to be recovered in Tucker Act suits are in substance orders "for the payment of money" which, under 28 U.S.C. 2321, are reviewable by a single judge, not by a three-judge, district court. Moreover, such orders are not of such widespread effect and public importance as to justify the expedited procedure of a three-judge court. A one-judge district court proceeding is in accord with this Court's decision in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426.

## ARGUMENT

As shown by its memorandum filed in response to the petition for certiorari, the United States acquiesced in the granting of the petition for the reason that the reviewability of Interstate Commerce Commission determinations made upon referrals by courts under the primary jurisdiction doctrine has become of increasing public importance since this Court's decision in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59. Conflicting decisions of the lower courts in this area reflect confusion and uncertainty.

Apart from this case in the Court of Claims, the United States, as a litigant in courts making such referrals since the decision in the *Western Pacific* case, has consistently taken the position that ensuing

determinations by the Interstate Commerce Commission are "orders" within the meaning of 28 U.S.C. 1336 and 49 U.S.C. 17(9), and are, therefore, subject to independent review pursuant to those statutes. However, the Commission has expressed a contrary view, has intervened as of right [2] in a number of actions brought pursuant to 28 U.S.C. 1336 to obtain review of its determinations upon referral, and has asserted that the court lacked jurisdiction over the subject matter. *E.g., Davidson Transfer and Storage Co.* v. *United States,* 164 F. Supp. 571 (D. Md.); *United States* v. *United States, et al.,* Civil Action No. 1057–58 (D. D.C.), decided on October 5, 1959. The Commission's position has been that a referral determination is not an "order" within the meaning of Section 1336 because (1) it is merely ancillary to the pending court action; (2) it does not determine any right or obligation; and (3) it is solely an exercise of the Commission's function of investigation. In so arguing, the Commission has relied principally upon *United States* v. *Los Angeles & Salt R. Co.,* 273 U.S. 299, *United States* v. *Atlanta, B. & C.R. Co.,* 282 U.S. 522, *Shannahan* v. *United States,* 303 U.S. 596, and related cases. In the *Davidson* case, *supra,* the Commission's position was rejected. In *United States* v. *United States, supra,* however, the district court ac-

[2] 28 U.S.C. 2323 provides in part:

> The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

cepted the Commission's contentions and dismissed the action upon the ground that the referral determination was not an independently reviewable order. The opposition of the United States to petitioner's motion for a stay in the Court of Claims was based upon the same grounds and cases relied upon by the Commission (R. 34–37).

As shown hereafter, we think it clear that Congress did not intend that Commission action taken under the primary jurisdiction doctrine should be free from judicial scrutiny and the real issue is the appropriate forum for review of Commission determinations made pursuant to a reference. This question is one of such substantial importance to sound judicial administration that the Government believes that it may be of best assistance to the Court by submitting an objective discussion of the pertinent standards of judgment, since the Government's principal interest is its concern for the adoption of desirable review proceedings. An understanding of the procedural issue requires a consideration of factors broader than the context of the precise question involved in this particular case.

## I

### INTRODUCTION: THE PRACTICAL ADVANTAGES AND DISADVANTAGES OF THE ALTERNATIVE REVIEW PROCEEDINGS

In view of the factors this Court has considered in procedural matters, when not restricted by congressional limitations, the Court may be interested initially in a review of the comparative advantages and disadvantages of the alternative review procedures before detailed analysis of pre-existing statutory or judicially imposed restrictions.

Under the doctrine of primary jurisdiction as explained by this Court in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, it was made clear that in a suit between a rail carrier and private shippers, as well as the United States as a shipper, questions as to the construction or reasonableness of rates were within the exclusive primary jurisdiction of the Interstate Commerce Commission when enforcement of a claim required the resolution of issues, which, under the regulatory scheme, had been placed within the special competence of the administrative body, and in such a case the judicial process should be suspended pending referral of such issues to the Commission for its views (*id.* at 64). Since the decision in that case, proceedings have been suspended and referrals made to the Commission as to the reasonableness of rates in cases originating in the Court of Claims, the district courts, and state courts. A large proportion of cases by carriers against the United States under the Tucker Act have been brought in the Court of Claims. Suits by shippers against rail carriers for the recovery of transportation charges frequently are filed in the district courts or the state courts. When a question of reasonableness is raised, these courts may be required to stay the action so that a determination of the question may be made by the Commission. Since state courts have no authority to review administrative action taken by a federal agency under the dualism of the federal-state system, there can be no question but that review of Commission determinations is limited to that provided in the district courts under 28 U.S.C. 1336 and 1398

and 49 U.S.C. 17(9), and state courts may not enter judgment until any review proceedings in the federal system have terminated. *Thompson* v. *Texas-Mexican R. Co.*, 328 U.S. 134, 151. See also *infra*, pp. 14–20.

As the Commission has argued in the lower courts, a denial to a referring federal court, whether the Court of Claims or a district court, of the authority to review determinations of the Commission, in favor of another federal court, is fraught with certain practical disadvantages. The court in which the action is originally brought, with jurisdiction of the parties, would be required to continue holding the case in abeyance while an independent proceeding to review the Commission's determination is instituted and conducted in another federal court. Since it is the practice of the Commission, after making its determinations as to the reasonableness of rates, to enter an order discontinuing the proceeding without making an order for or against the payment of the sums involved, the reviewing court, if it is not the referral court, would enter no judgment of liability and, upon completion of the administrative process and later the review proceeding, the court of original instance would then, upon motion, enter judgment. It is obvious that this circuitous procedure may well result in a multiplicity of actions in different jurisdictions.

This circuitous procedure, with its splitting of litigation between several federal courts, may also be said in some measure to conflict with the apparent theory of a reference to the Commission by the court of original instance of a question of tariff reason-

ableness, as defined in *United States* v. *Western Pacific R. Co., supra.* There, the Court reiterated that issues of tariff construction and the reasonableness of a tariff as applied were "first" or "initially" matters (352 U.S. at 69, 70), for the Commission's determination:

> * * * [I]n such a case the judicial process is suspended pending referral of such issues to the administrative body for its views [*id.* at 64].

The Court quoted from *Far East Conference* v. *United States,* 342 U.S. 570, 574:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by *preliminary resort* for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure. [Emphasis added.]

The reasoning of the Court appeared to assume that the Commission's determination was in aid of the judicial process of the referring court and, after the Commission's initial determination, the referring court would be able to proceed. It is in this light that the Commission has assumed that in a reference case its determination constitutes an ancillary step in aid of the pending action and that, in making its special findings upon an issue involved in that suit by virtue of its special competence, it was not its function to pass upon the ultimate question of whether plaintiff or defendant should prevail in the pending court action.

On the other hand, there does appear to be a practical advantage in limiting the judicial forum for review to the district courts under 28 U.S.C. 1336 and 1398 and 49 U.S.C. 17(9). A proceeding to review Commission action under these statutes takes the form of a civil action in the district court against the United States (28 U.S.C. 2322) to enjoin or suspend the determinations made. The Commission has a right to intervene (28 U.S.C. 2323) and as a matter of practice the suit is ordinarily brought against the United States and the Commission. Although the position asserted on behalf of the United States may not be the same as the position asserted by the Commission, the court has the benefit of the views of the Commission. When determinations of the Commission are under attack, it may be a desirable procedure for the Commission to participate in their defense. If the determinations of the Commission were subject to review by the original court of referral, the Commission would not be a party[3] and, unless the Commission or the United States intervened in this litigation between shipper and carrier, the Government would not be heard (as it is always heard in review proceedings under the Urgent Deficiencies Act).

On balance, if this issue could be resolved exclusively in terms of the preferable judicial procedure, it would seem to be desirable for the referring court, whether the Court of Claims or a federal district court, to be

[3] Nor would the United States be a party if the shipper were private.

the court to effect the limited statutory review of Commission action under the Urgent Deficiencies Act [4] and also to determine the dispute between the parties in the same proceeding.

But the question cannot be resolved solely by a comparative weighing of the practical advantages and disadvantages of the alternative channels of review. Congress has spoken, and the choice is limited by the framework established by the statute.

## II

### WHEN THE COURT OF CLAIMS REFERS A RATE ISSUE TO THE COMMISSION, ITS DETERMINATION IS REVIEWABLE UNDER 28 U.S.C. 1336 BY A DISTRICT COURT

#### A. UNDER PRIOR DECISIONS OF THIS COURT, COMMISSION DETERMINATIONS UPON REFERENCE ARE REVIEWABLE ORDERS

In *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 128, the Federal Communications Commission classified the telephone company "as subject to all common carrier provisions of the Communications Act of 1934." In holding that this status determination was reviewable under the Urgent Deficiencies Appropriations Act,[5] the Court repudiated the "negative

[4] Under the doctrine of administrative finality, only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof can be raised upon review. If these legal tests are satisfied, the Commission's determination becomes incontestable. *Rochester Telephone Corp.* v. *United States* 307 U.S. 125, 140; *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U.S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541.

[5] Pursuant to the provisions of Section 402(a) of the federal Communications Act of 1934, the Commission's orders were reviewable in the same manner as orders of the Interstate Commerce Commission.

order" doctrine. Instead, it decided that the critical consideration was that the Commission determination was "not a mere abstract declaration * * * nor was it a stage in an incomplete process of administrative adjudication" (*id.* at 143).

Subsequently, in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, the Court directed the referral to the Interstate Commerce Commission of a question involving the legality of past practices pertaining to the payment of car allowances to a shipper. The Commission made a determination adverse to the shipper and ordered that the proceedings be discontinued. The shipper then brought an action before a three-judge district court in the Northern District of California[6] to set aside and annul the Commission's decision. Holding that the Commission "made no decision which required any party to the proceeding before it to do or not to do any specific act," and that "[h]ence there is no order, in the sense contemplated in the statute," the district court dismissed the action. *El Dorado Oil Works* v. *United States*, 59 F. Supp. 738, 739. On appeal, this Court decided both the jurisdictional question and the merits. *El Dorado Oil Works* v. *United States*, 328 U.S. 12. In disposing of the jurisdictional question, the Court said (*id.* at 18–19):

> * * * As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract

[6] Because of the venue provisions of 28 U.S.C. 1398, the independent review action was brought in the same judicial district as the original action.

> declaration." *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 143. "Legal consequences" (*id.* at 132) would follow which would finally fix a "right or obligation" (*id.* at 131) on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. *Id.* at 143. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Telephone Corp.* v. *United States, supra,* held to be reviewable by a district court of three judges. The District Court erred in dismissing the complaint for want of jurisdiction.

We see no basis for any cogent distinction between *El Dorado* and the present case.

On the other hand, the Commission action in such cases as *United States* v. *Los Angeles & Salt R. Co.,* 273 U.S. 299, was markedly different from that here involved. In the *Los Angeles* case the Commission, pursuant to a Congressional directive, had conducted an investigation into the value of the property of the railroad. Upon the conclusion of the investigation, it made a finding as to value. Dissatisfied with this finding, the railroad brought an action in the district court under the Urgent Deficiencies Appropriations Act to set it aside. This Court reversed the district court's holding (4 F. 2d 736) that it had jurisdiction to review the Commission finding, on the ground that the finding did not "command the carrier to do, or to refrain from doing, anything"; or "determine any right or obligation * * *. It was merely preparation for possible action in some proceeding which may be

instituted in the future * * *" (273 U.S. at 309–310).[7] Similarly, in *United States* v. *Atlanta, B. & C.R. Co.*, 282 U.S. 522, 527–528, the Court held that the district court did not have power to review a Commission finding which was made in the course of an investigation and which was not binding without further action by the Commission.

In *Shannahan* v. *United States*, 303 U.S. 596, the Commission, upon referral from the National Mediation Board pursuant to the Railway Labor Act, determined that a particular railway was not a "street, interurban, or suburban electric railway" within the meaning of Section 1 of that Act. In holding that the determination was not reviewable under the Urgent Deficiencies Appropriations Act, the Court noted that, as in the *Los Angeles* case, the determination was "merely preparation for possible action in some proceeding which may be instituted in the future" (*id.* at 599). It is true that the Court also pointed out that the administrative ruling was not in the form of an order and that "it is as clearly 'negative' as orders by which the Commission refuses to take requested action" (*ibid.*). But considerations of this kind appear to be no longer relevant in view of this Court's decision in *Rochester Telephone Corp.* (see *supra*, pp. 14–15).[8]

[7] It may also be noted that in the *Los Angeles* case the Court pointed out that the Commission was there acting neither in a quasi-judicial capacity to determine a controversy nor in a legislative capacity under its rate-making power (see 273 U.S. at 309). In the present case, the Commission was exercising a quasi-judicial function.

[8] See the discussion of the *Shannahan* and *Rochester* cases in Davis, *Administrative Law* (1951), pp. 654–655.

In other words, in the *Los Angeles, Atlanta,* and *Shannahan* cases, the Commission had taken no final action which in itself carried any adverse legal effects and, therefore, resort to the courts was premature.[9] This cannot be said of the Commission's determination here. True enough, that determination did not in form require petitioner to do any particular act. But, as in *El Dorado* (see 328 U.S. at 19), it terminated all administrative action and, of greater importance, its decision carried serious and direct legal consequences insofar as the litigants were concerned. Under the doctrines of primary jurisdiction and administrative finality, the Commission's determination is binding, unless reversed, and therefore fixes the rights and obligations of both the United States and petitioner with respect to the transportation charges for the shipments involved.

B. THE COURT OF CLAIMS DOES NOT HAVE AUTHORITY TO REVIEW A DETERMINATION OF THE COMMISSION, WHETHER OR NOT MADE UPON REFERENCE

We are unable to escape the conclusion that the congressional scheme may not be reconciled with authority in the Court of Claims to review determinations of the Interstate Commerce Commission. Congress has never empowered that court to pass upon determinations of the Commission interpreting tariffs or deciding their reasonableness, and the restrictions Congress has imposed upon the review of orders of the Commission, as well as the limited juris-

[9] See this Court's comments to this effect concerning this class of cases in *Rochester Telephone Corp* v. *United States*, *supra*, 307 U.S. at 130.

diction conferred by the Congress upon the Court of Claims, preclude such jurisdiction. Indeed, in a unanimous opinion in *United States* v. *Jones,* 336 U.S. 641, this Court expressed the same conclusion in explicit and unqualified language. There, the Court of Claims awarded a judgment in favor of a railroad for increased compensation for carrying the mail, notwithstanding the prior denial by the Commission of applications by the carrier for additional sums in excess of those paid under the rates fixed by the Commission. In reversing that decision, the Court said (*id.* at 651–652):

> Congress in no instance has expressly empowered the Court of Claims to review rate orders of the Commission, either to set them aside or to render a money judgment for additional amounts found due upon a determination of an order's invalidity. To infer such an intention would be contrary not only in spirit to the limitations Congress has placed upon review of such orders wherever expressly provided, but also to the whole history and practice of Congress in conferring jurisdiction on the Court of Claims.

The Court then pointed out that a review in the district court under 28 U.S.C. (1946 ed.) 41(6) of decisions of the Commission "arising under the postal laws" (*id.* at 671):

> possesses one outstanding advantage over review in the Court of Claims. It is that the district courts are not confined, as is the Court of Claims, to rendering a money judgment by way of relief against the United States. Under their general equity jurisdiction they would

> have power, on finding a rate order invalid, whether as confiscatory or as not complying with the statute, to remand the cause to the Commission for further proceedings. In this respect the review afforded and the relief given would more nearly approximate that given by the Urgent Deficiencies Act in similar cases reviewable under its terms.

The reasoning of the Court seems as applicable to a case which has been referred by the Court of Claims to the Commission as in the situation where there has been no reference. We deal here with the question of the jurisdiction of the Court of Claims as prescribed by the Congress and it would appear to be impossible to reconcile those statutory limitations with any assumption of the review power. Congress could not have intended that the Court of Claims should not have jurisdiction to review decisions of the Commission in an initial action but, when the Court of Claims referred an issue to the Commission, its determination became reviewable by that court.

It follows, in our view, that petitioner is correct in asserting that the court below was without power to review the Commission's ruling in this case. Therefore, unless the Commission's decision is reviewable by a federal district court acting under 28 U.S.C. 1336, 1398, and 49 U.S.C. 17(9), it would not be reviewable by any court, even though entered arbitrarily, without substantial supporting evidence, and in defiance of law. Such a notion of sweeping administrative finality is not reconcilable with the general legislative pattern of administrative and judicial relationships (Administrative Procedure Act, Sections 2(d), 10, 5 U.S.C. 1001(d),

1009; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 433–434) or the clear congressional intent to provide for review of Commission orders.

## III

### WHEN A DISTRICT COURT REFERS AN ISSUE TO THE COMMISSION, ITS DETERMINATION WITH RESPECT TO RATES MAY BE REVIEWABLE BY THE REFERRING DISTRICT COURT IN THOSE CASES IN WHICH VENUE IN ANOTHER DISTRICT MAY APPROPRIATELY BE HELD TO HAVE BEEN WAIVED. IN OTHER CASES, REVIEW MUST BE HAD IN THE DISTRICT COURT WITH VENUE UNDER 28 U.S.C. 1398

So that the Court may have a better understanding of the review procedure under the Urgent Deficiencies Appropriations Act insofar as it relates to referrals by the Court of Claims to the Interstate Commerce Commission, we deem it advisable as background to discuss briefly the situation in which the referring court is a district court. In such a situation, a suit is brought in a district court with jurisdiction of the parties, by a shipper against a railroad, or by a railroad against a shipper, for transportation charges, and, upon motion or upon the initiative of the court, a rate issue is referred to the Commission and the proceedings are stayed pending its determination. After that determination, may a party seek review in the district court of original jurisdiction or must a suit be brought only in the judicial district of the residence or principal office of the party or parties bringing the action under 28 U.S.C. 1398 and 49 U.S.C. 17(9) (*supra*, pp. 2–3)? In this situation, it would be preferable (for the

reasons set forth in Point I, *supra*) to channel the review proceedings under the Urgent Deficiencies Act into the referring court—to the extent that that is permissible under the statutory plan. We suggest that this can be accomplished in some measure by application of the concept of waiver to the venue provisions of 28 U.S.C. 1398.

Congress appears to have explicitly authorized review proceedings in all federal district courts and the venue provision of the statute must be deemed solely for the benefit of the party instituting the review action. Venue relates to the convenience of litigants. *Neirbo Co.* v. *Bethlehem Corp.*, 308 U.S. 165. It may be waived by any party, including the Government. *Panhandle Co.* v. *Power Commission*, 324 U.S. 635, 639; *Peoria & P.U.R. Co.* v. *United States*, 263 U.S. 528, 535–536. The undesirability of a circuitous review procedure, with its multiplicity of proceedings, could perhaps lead to judicial rules of construction in which a party shall be deemed to have agreed to waive the venue requirements of 28 U.S.C. 1398 and to have consented that the referring court shall be the proper reviewing tribunal under the Urgent Deficiencies Act.

However, where waiver of the venue provisions of Section 1398 cannot appropriately be inferred in favor of the referring court—and these may be the majority of the instances—review must be had in the district court with the venue prescribed by that section.

## IV

### THE COMMISSION DETERMINATION IS REVIEWABLE BY A SINGLE-JUDGE, NOT A THREE-JUDGE, DISTRICT COURT

In bringing its suit to review the Commission's order in the District Court for the Eastern District of Pennsylvania, petitioner did not request the convening of a three-judge court (R. 38–42; petitioner's brief, p. 12, fn. 7). In similar cases, the Government has taken the position that a one-judge, rather than a three-judge, court is proper [10] because Commission orders pertaining to the reasonableness of past charges sought to be recovered in Tucker Act suits are in substance orders "for the payment of money" which are not reviewable by a three-judge court.[11] In addition, these orders are not of such widespread effect

---

[10] See *Davidson Transfer & Storage Co.* v. *United States*, *supra*; *Eastern Freight-Ways, Inc.* v. *United States*, 170 F. Supp. 848 (D. N.J.). And in seeking review of a Commission order made on referral of a rate question from a Tucker Act suit in the District Court for the District of Minnesota, the Government brought its suit (*United States* v. *United States, et al.*, Civil Action No. 1057–58) before a one-judge court in the District of Columbia.

[11] 28 U.S.C. 2321 provides:

> The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission *other than for the payment of money* or the collection of fines, penalties and forfeitures, shall be as provided in this chapter. [Emphasis added.]

Later in 28 U.S.C., Chapter 157, it is provided in Section 2325 that an injunction restraining the enforcement of an I.C.C. order shall not be granted except by a three-judge court.

and public importance as to justify the expedited procedure of a three-judge reviewing court. Thus, the one-judge proceeding is in accord with the principles enunciated by this Court in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 441–443.[12]

## CONCLUSION

1. The Court of Claims does not have the statutory authority to review determinations of the Interstate Commerce Commission, whether the issue of reasonableness of rates is referred to the Commission by the Court of Claims or not, and review is limited to that provided in 28 U.S.C. 1336 and 1398 and 49 U.S.C. 17(9) by a one-judge, rather than a three-judge, district court.

2. Implicit in the decision of the Court of Claims entering judgment for petitioner in favor of the Government, in reliance upon the decision of the Commission, was the assumption that that decision was final and was not reviewable by any court, even though entered arbitrarily. It is apparent that such a notion of sweeping administrative finality is not reconcilable with either the general legislative pattern of administrative and judicial relationships or the clear congressional intent to provide for review of Com-

[12] It is true that in the *El Dorado* case, this Court stated (328 U.S. at 19) that the Commission referral determination there involved was reviewable by a three-judge district court. The point was not discussed, however, and, in any event, *El Dorado* was decided prior to *United States* v. *Interstate Commerce Commission, supra.* The latter decision casts considerable doubt regarding the present vitality of this aspect of *El Dorado.* See 337 U.S. at 442.

mission orders. Accordingly, the judgment below should be reversed and the cause remanded, with instructions to suspend the proceedings in the Court of Claims pending the outcome of petitioner's action in the Eastern District of Pennsylvania.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*
GEORGE COCHRAN DOUB,
*Assistant Attorney General.*
ALAN S. ROSENTHAL,
KATHRYN H. BALDWIN,
*Attorneys.*

MAY 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960